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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 476

ILLINOIS PACKING COMPANY, A CORPORATION, *Petitioner,*

VS.

CHARLES B. HENDERSON, INDIVIDUALLY
AND AS ACTING ADMINISTRATOR OF THE
OFFICE OF FEDERAL LOAN ADMINISTRATOR, WASHINGTON, D. C.
AND RECONSTRUCTION FINANCE CORPORATION,
A CORPORATION, WASHINGTON, D. C., *Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES EMERGENCY COURT OF
APPEALS.**

✓ IRWIN N. WALKER
and

✓ PETER B. ATWOOD,
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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Summary Statements of the Matter Involved	3
Specification of Errors to be Urged	8
Reasons Relied on for the Allowance of the Writ	9
Conclusion	20

TABLE OF CITATIONS

CASES:

<i>Armour & Co. v. Bowles</i> , 148 F. (2d) 529, certiorari denied 328 U. S. 875	11
<i>Earl C. Gibbs Inc. v. Defense Supplies Corporation and Reconstruction Finance Corporation</i> , 155 F. (2d) 525, pending before the Supreme Court of the United States on petition for writ of certiorari as No. 147 of the October term, 1946.....	11, 18, 19
<i>Heiner v. Donnan</i> , 285 U. S. 312.....	16, 18
<i>Heinz v. Bowles</i> , 149 F. (2d) 277, and on reconsideration 150 F. (2d) 546	11
<i>Illinois Packing Co. v. Snyder</i> , 151 F. (2d) 337, 339.....	11
<i>Schlesinger v. Wisconsin</i> , 270 U. S. 230.....	16, 17
<i>Tot v. United States</i> , 319 U. S. 463.....	15

STATUTES:

Emergency Price Control Act of 1942, 56 Stat. 23; 50 U. S. C. A. app. Sections 901, et seq.....	2, 13
Act of June 23, 1945 (S. 502, Public Law 88, 79th Congress, First Session; c. 193, 59 Stat. 260, 15 U. S. C. A., Sec. 606(b) n)	7
Stabilization Act of 1942, as amended, 56 Stat. 756; 50 U. S. C. A. 961, et seq.....	12

EXECUTIVE ORDERS, DIRECTIVES AND REGULATIONS:

Executive Order No. 9250, dated October 3, 1942, 7 F. R. 7871, as amended by E. O. No. 9381, 8 F. R. 13083.....	12
Executive Order No. 9328, dated April 8, 1943, 8 F. R. 4681	4
Directive of the Director of Economic Stabilization, dated October 25, 1943, 8 F. R. 14641.....	4, 5, 9
Amendment 2 to Regulation 3 of Defense Supplies Corporation—Livestock Slaughter Payments, 9 F. R. 1820	3, 6
Regulation 3 of Defense Supplies Corporation, 8 F. R. 10826	3
Amendment No. 15 to RMPR 169, 8 F. R. 7675	4

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*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of
the United States:*

Your petitioner, ILLINOIS PACKING COMPANY, a corporation, petitions this Court for a writ of certiorari to review a judgment of the United States Emergency Court of Appeals in the above entitled case.

OPINIONS BELOW.

The opinion of Defense Supplies Corporation denying the Protest of Petitioner appears in the record at page _____. The opinion of the Emergency Court of Appeals has not as yet been reported. It appears in the record at pp. _____ to _____.

JURISDICTION.

The judgment of the Emergency Court of Appeals sought to be reviewed was entered on August 15, 1946. The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U.S.C.A. App. Sec. 924(d).

QUESTIONS PRESENTED.

1. Whether the Petitioner, who is entitled to receive a special subsidy under the terms of the Directive of October 25, 1943, issued by the Office of Economic Stabilization, has the right to receive such special subsidy free of additional limiting conditions and qualifications imposed by the Regulation of Respondents.

2. Whether the Regulation of Respondents, issued pursuant to the Directive, but denying the special subsidy to a non-processing slaughterer, such as the Petitioner, which is allegedly owned or controlled by a processor or purveyor of meat, is rationally related to the purpose and policy of the Directive, and whether or not it is arbitrary, unreasonable and capricious.

3. Whether the provision of the Regulation of Respondents, which defines ownership and control in terms of ownership of in excess of 10% of the stock of the Petitioner, has any rational or logical basis, or whether it is arbitrary, unreasonable and capricious.

4. Whether the Respondents have the right to define ownership and control in terms of a conclusive presumption of fact which denies to the Petitioner and others similarly situated the right to a hearing and to present evidence with respect to the determination of the existence of ownership or control as a matter of fact.

5. Whether the Respondents may, on the ground of considerations of administrative convenience, impose by regulation a conclusive presumption of fact, contrary to the true facts, and on the basis of such presumption deny to the Petitioner the subsidy payment to which it is otherwise entitled.

6. May the Respondents lawfully deny the subsidy payment to Petitioner on the basis of a conclusive presumption of ownership or control, when actual ownership or control does not exist, such denial being based upon the fact of ownership of in excess of 10% of the stock of the Petitioner, and the asserted administrative inconvenience of determining whether the stock ownership does, in fact, create ownership or control.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The complaint before the Emergency Court of Appeals presented a challenge to certain provisions of Amendment 2 (9 F. R. 1820) to Regulation 3 (8 F. R. 10826) issued by Defense Supplies Corporation, a wholly owned subsidiary of Reconstruction Finance Corporation (6 F. R. 2972). Defense Supplies Corporation was later dissolved, and its functions and duties assumed by Reconstruction Finance Corporation (R.). Charles B. Henderson, Respondent, is the duly acting and appointed Administrator of the Office of Federal Loan Administrator, charged with the duty of making certain determinations of fact under Section 2(e) of the Emergency Price Control Act in connection with the issuance of subsidy payments under the Act.

Petitioner is a corporation engaged in the slaughter of cattle and other livestock. It is by definition of the Directive a non-processing slaughterer, in that it derives all of its income from the sale of meat, deriving no profit or other benefit, direct or indirect, from the processing of the raw by-products of cattle slaughter.

In June, 1943, as a part of the President's Hold-the-Line policy (E.O. 9328, 8 F. R. 4681), the maximum prices of carcass beef and wholesale cuts, by order of the Economic Stabilization Director, were reduced approximately 10% (Amendment No. 15 to R.M.P.R. 169, 8 F. R. 7675). By regulation No. 3 (8 F. R. 10826) issued by Defense Supplies Corporation, provision was made for payment of compensatory subsidies to slaughterers so that they in turn could continue to pay the same prices as before for live cattle. No controls were imposed on live cattle prices.

It was recognized that non-processing slaughterers, of whom Petitioner was one, were at a disadvantage in relation to the integrated slaughterers who derived additional income and profit through the processing of the by-products of cattle.

It was deemed inadvisable, however, to establish higher ceiling prices for non-processing slaughterers in order that the relationships of cattle prices and meat prices might be stabilized. Instead, an additional subsidy was provided for the relief of non-processing slaughterers. The Office of Economic Stabilization, in a Directive dated October 25, 1943 (8 F. R. 14641), directed Defense Supplies Corporation to amend its regulation 3 so as to provide for the payment to non-processing slaughterers of a special subsidy, or extra compensation, designed to equalize their position with respect to integrated slaughterers. This subsidy was given in lieu of a higher ceiling price in favor of such non-processing slaughterers, and provided for a special additional subsidy affording them a benefit equivalent

to what they would have obtained by higher ceiling price differentials in their favor.¹

The Directive of October 25, 1943, insofar as the special subsidy was concerned, was brief and concise and contained a direction to Defense Supplies Corporation to pay a subsidy of 80¢ per cwt. of cattle slaughtered to a certain class of slaughterers (who are herein referred to under the term "non-processing" slaughterers) and directed Defense Supplies Corporation to amend Regulation No. 3 in accordance with the Directive.² Amendment 2 of Defense Supplies Corporation was promulgated "pursuant to" the terms of the Directive. It established a special subsidy and in addition thereto certain conditions to the payment of such subsidy which were not provided for or referred to in the Directive.

Amendment 2 provided that to be eligible for the special subsidy, a non-processing slaughterer as defined must be an "unaffiliated slaughterer"; that is, it must not "own or control" or be "owned or controlled by" a processor

¹The interrelation between RMPR 169 and the special subsidy herein involved is set forth at length in the opinion of the Emergency Court of Appeals in *Earl C. Gibbs, Inc. v. Defense Supplies Corporation and Reconstruction Finance Corporation*, 155 F. (2d) 525, now pending before this court for a writ of certiorari as No. 147 of the October term, 1946.

²The Directive so far as applicable to this controversy provided as follows:

"5. Slaughterers who during the year 1943, or a representative portion thereof, sold and who currently sell 98% or more of the total dressed carcass weight of cattle slaughtered by them in the form of carcasses, wholesale cuts, frozen boneless beef (Army specifications) (carcass equivalent) or ground beef, shall be paid in addition to the payments authorized by Regulation No. 3 of Defense Supplies Corporation (Livestock Slaughter Payments), the amount of \$0.80 per cwt. of cattle slaughtered during the month for which such payments are made.

6. Defense Supplies Corporation is directed to amend Regulation No. 3 (Livestock Slaughter Payments) in accordance with this Directive." (8 F. R. 194641).

or purveyor of meat. The phrase "own or control" is defined as meaning "to own or control directly or indirectly a partnership equity or in excess of 10% of any class of outstanding stock or to have made loans or advances in excess of 5% of the other person's monthly sales."¹

The subsidy payment was instituted November 1, 1943. The Petitioner, which was a non-processing slaughterer and eligible under the terms of the Directive, filed claims for extra subsidy for the period November 1, 1943 to May 29, 1944. It received from Defense Supplies Corporation the amount of \$308,520.08 for the period November 1, 1943 to April 30, 1944. During this period, and also during the period from May 1, 1944 to May 29, 1944 in excess 10% of the common stock of Petitioner was owned directly or indirectly by Pfaelzer Brothers, who were processors or purveyors of meat. On May 20, 1944, Defense Supplies Cor-

¹"Pursuant to a directive issued by the Office of Economic Stabilization on October 25, 1943 (8 F. R. 14641), Regulation No. 3 of Defense Supplies Corporation is hereby amended by adding a new § 7003-14, as follows:

§ 7003.14 Extra compensation for non-processing slaughterers of beef—(a) Definitions. (1) 'Non-processing slaughterer of beef' means an unaffiliated slaughterer as hereinafter defined during six consecutive months of 1942, sold, and who currently sells, 98% or more, measured in dressed carcass weight, of the total beef produced from cattle slaughtered by him in all his establishments, in the form of carcasses, wholesale cuts, boneless beef or ground beef.

(2) 'Unaffiliated slaughterer' means a slaughterer who does not own or control a processor or purveyor of meat, and who is now owned or controlled by a processor or purveyor of meat. 'Unaffiliated slaughterer' shall not include any institution, representative or agency or Federal, State or local governments.

(3) 'Processor or purveyor of meat' means a person who processes fresh beef or sells or dispenses fresh or processed meat or products containing meat, at wholesale or at retail, or in a hotel, restaurant or other eating establishment.

(4) 'Own or control' means to own or control directly or indirectly a partnership equity or in excess of ten percent of any class of outstanding stock or to have made loans or advances in excess of five percent of the other person's monthly sales.

poration notified Petitioner that it considered that it was not entitled to the special subsidy since in excess of 10% of its stock was owned by a processor or purveyor of meat, Pfaelzer Brothers. Thereupon, there was recouped from Petitioner the sum of \$308,520.08 which it had received as special subsidy. The further claim of Petitioner to subsidy for the period May 1, 1944 to May 29, 1944 in the amount of \$48,086.95 was denied for the same reason. On May 29, 1944 Pfaelzer Brothers disposed of their stock in Petitioner. Thereafter Defense Supplies Corporation resumed payment to the latter of the special subsidy. A protest against Amendment 2 to Regulation 3 was filed with Defense Supplies Corporation and was denied. (R.)

The complaint in the Emergency Court of Appeals was then filed.

This complaint covered the period from November 1, 1943 to May 29, 1944, and involved, first, Petitioner's claim for subsidy in the amount of \$308,520.08 accrued and paid to Petitioner for the period November 1, 1943 to April 30, 1944, and second, Petitioner's claim for subsidy accrued, but not paid, in the amount of \$48,086.95, covering the period May 1, 1944 to May 29, 1944.

After the passage of the act of June 23, 1945 (59 Stat. 260, 15 U. S. C. A. Sec. 606(b)), the Petitioner filed a claim for relief under that Act and was successful in obtaining repayment to it of the sum of \$308,520.08 which Defense Supplies Corporation had recouped. This claim was filed with the Office of Price Administration, proceeding under the Act of June 23, 1945, and it was found that the Petitioner had received the compensatory payments in good faith, reasonably believing it was entitled thereto, and that it would be inequitable to require Petitioner to repay any payments actually received. (R.)

However, by virtue of the fact that the Act of June 23, 1945 authorized relief only as to payments actually received, it was not possible to extend relief with respect to the sum

of \$48,086.95 for the period May 1, 1944 to May 29, 1944, which said sum remains unpaid and is now the subject of the present controversy.

The complaint in the Emergency Court of Appeals was directed to the validity of Amendment 2 to Regulation 3, Defense Supplies Corporation, on the ground that it was arbitrary and capricious and not in accordance with law insofar as it set up what was in effect an irrebuttable presumption of control predicated upon the existence of ownership of in excess of 10% of the capital stock of Petitioner.

Petitioner was in fact independent business entity. Its business was in no way affiliated with or integrated with a processor or purveyor of meat. It derived no profit or other financial benefit, direct or indirect, from the processing of the raw by-products of cattle slaughtered.

SPECIFICATION OF ERRORS TO BE URGED.

The Emergency Court of Appeals erred in the following respects:

1. In holding that the Respondents had the power to impose conditions upon Petitioner's right to receive the special subsidy directed to be paid by the Economic Stabilization Director. Petitioner was clearly entitled to the subsidy under the terms of the Directive.

2. In holding that the provisions of Amendment 2 denying the special subsidy to a non-processing slaughterer who, according to Respondent's definition, was owned or controlled by a processor or purveyor of meat, had a rational relationship to the purpose and policy of the Directive.

3. In holding that there was a rational basis for the provisions of Amendment No. 2 creating a conclusive presumption that the mere ownership of in excess of 10% of any class of the outstanding stock of Petitioner constitutes ownership and control by the stockholder.

4. In refusing to declare Amendment 2 invalid in that it arbitrarily established a conclusive presumption of ownership or control contrary to fact.

5. In refusing to declare Amendment 2 invalid in that it provided no opportunity to rebut the presumption by hearing and proof of facts which were pertinent to the question of ownership and control, and in that it denied to Petitioner the further opportunity to be heard and to present facts showing that it derived no benefit from the ownership of any of its outstanding capital stock by a processor or purveyor of meat.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

These proceedings present an important question of federal law which has been decided by the Emergency Court of Appeals in conflict with the applicable decisions of this Court. The question involves a principle which is fundamental to the principles of administrative law and one which is of broad public importance, not only as applied to the specific facts involved in these proceedings, but also to the matter of the determination of rights of private litigants by administrative agencies of this Government.

It is of further importance because the Emergency Court of Appeals has exclusive jurisdiction of all cases involving the validity of price and subsidy regulations issued under Section 2 of the Emergency Price Control Act. Its decisions cannot be corrected except by this Court, and since the decision in the instant proceeding is in conflict with the decisions of this Court, the granting of a writ of certiorari is the sole procedure by which the rights of this litigant may be upheld.

It is a matter of common knowledge that the subsidy program in the United States has been an important factor in this country's stabilization program. The meat subsidy and the special subsidy to non-processing slaughterers of beef is no exception. This Petitioner purchased cattle within the range of pegged prices provided in the Directive of the Office of Economic Stabilization (Oct. 25, 1943) in the reasonable business expectation of receiving the special

subsidy. Without the special subsidy it could not continue in business. Respondent's Amendment 2 to Regulation 3 is ambiguous in its definition of who are unaffiliated slaughterers. In this broad national stabilization program in which Petitioner was contributing by the use of its own funds to purchase cattle within these pegged price ranges, it could not be reasonably anticipated that the Government would deny to Petitioner its extra subsidy on the theory that somebody owned 10% or more of its outstanding capital stock and from this ownership, over which Petitioner had no control, there was conclusively presumed ownership or control of Petitioner, contrary to actual facts.

Whether any agency of the United States Government is authorized to establish by Regulation arbitrary presumptions of fact which may be contrary to actual facts is a matter of broad public importance. Arbitrary presumptions of facts have the faculty of depriving persons, as they have in this case, of their property without any fair hearing and in fact without any hearing. Whether this agency in this case has such broad authority or whether any agency of the United States Government has this authority is a matter of broad public import warranting the consideration of this court.

The following specific points are advanced by Petitioner in support of its contention that the ruling of the Court below is in conflict with the applicable decisions of this Court.

A.

The special additional subsidy directed and authorized by the Directive of the Office of Economic Stabilization, dated October 25, 1943, was not payable to Petitioner as a matter of grace, nor was it a gratuity or bounty. Under the ceiling prices for the sale of meat, fixed by RMPR 169, and by virtue of the basic subsidy provided for by Regulation 3 of Defense Supplies Corporation, processing or integrated slaughterers as a group were able to operate at a

profit because the processing of by-products provided an additional source of income sufficient for profitable operation. Under the same ceiling prices, which were applicable to all meat sales, non-processing slaughterers, who represented an important segment of the industry, were unable to operate profitably and would therefore ultimately be forced out of business.

The Emergency Court of Appeals has reviewed the general history of the price regulation and its attendant problems in its opinion handed down in the case of *Earl C. Gibbs, Inc. v. Defense Supplies Corporation and Reconstruction Finance Corporation*, 155 F. (2d) 525, now before this Court on petition for writ of certiorari as No. 147 of the October term, 1946. It has also had occasion to consider them in *Armour & Co. v. Bowles*, 148 F. (2d) 529, certiorari denied 328 U. S. 875, in which it upheld the general validity of RMPR 169. However, its later decision in *Heinz v. Bowles*, 149 F. (2d) 277, and, on reconsideration, 150 F. (2d) 546, recognized the invalidity of RMPR 169 as applied to non-processing slaughterers unless the extra subsidy provided for by the Directive of October 25, 1943 was paid. It is therefore clear that the right to subsidy contended for by Petitioner is a right to a payment necessarily integrated with the entire price program. The right to the receipt of the additional subsidy was vital to the continued existence of Petitioner since without it the actual cost of live cattle purchased was greater than the allowable maximum sales price of the meat derived from the carcasses. As the Emergency Court of Appeals pointed out in *Illinois Packing Co. v. Snyder*, 151 F. (2d) 337, 339:

"Such subsidies are closely articulated with the price control program, and, as contemplated by Congress, may operate as compensatory in nature so as to validate a lower level of legal maximum prices than otherwise would be permissible under the standards laid down in the Price Control Act for the guidance of the Price Administrator."

B.

The power to make binding and authoritative determinations of policy with respect to the payment of subsidies was vested in the Office of Economic Stabilization, by virtue of the provisions of Sections 1 and 2 of the Act of October 2, 1942, the Stabilization Act of 1942 (56 Stat. 765) which authorized the President to issue general orders stabilizing prices, wages and salaries affecting the cost of living, such stabilization so far as practicable to be on the basis of levels which existed on September 15, 1942. The President was also given broad power to delegate his authority under the Act. By Executive Order No. 9250 issued October 3, 1942 (7 F. R. 7871) the President delegated his authority to the Office of Economic Stabilization.

In Title I of this Executive Order the Director of the Office of Economic Stabilization was ordered to formulate and develop a comprehensive national economic policy with respect to prices, rents, wages, salaries, profits, rationing, subsidies and all related matters with a view to stabilizing the cost of living in accordance with the Act of October 2, 1942. To give effect to this comprehensive national economic policy, it was stated that "the Director shall have power to issue directives on policy to the Federal departments and agencies concerned"; that the administration of activities related to the national economic policy "shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director."

In Title V. of Executive Order 9250 the Economic Stabilization Director was specifically authorized to direct "the Reconstruction Finance Corporation and other corporations organized pursuant to Sec. 5(d) of the Reconstruction Finance Corporation Act, as amended, to use their authority to subsidize and to purchase for resale if such measures are necessary to insure the maximum productions and distribution of any commodity, or to main-

tain ceiling prices or to prevent a price rise inconsistent with the purposes of this order."

Thus the authority to formulate and administer subsidy programs, while remaining to a certain extent in the hands of the respondents was in every respect subject to determinations of policy made by the Economic Stabilization Director. The powers delegated to him were exercised in his Directive of October 25, 1943, which directed the payment of the special subsidy and defined the terms and conditions which were to govern its payment. The Directive further directed the Defense Supplies Corporation to amend its regulation 3 in accordance with the Directive. Respondents recognized the binding authority of this Directive by specifically stating in the preamble of Amendment 2 that it was promulgated pursuant to the terms of the Directive.

Necessarily, therefore, the regulation was valid only insofar as it complied with the terms and conditions of the Directive. The Directive was clear and concise. No direction or authority was given to the respondents to impose additional qualifications and limitations upon the right to receive the subsidy. Insofar as the right to receive the subsidy was delimited or narrowed by the terms of Amendment 2, the latter is without legal warrant or authority and as such is unlawful.

C.

Section 204(b) of the Emergency Price Control Act specifically provides for the authority of the Emergency Court of Appeals, and of this court, to review and examine the validity of the regulation in question where it appears that such regulation is unlawful, arbitrary and capricious. It is maintained by Petitioner that the regulation is improper and that the right of review for the reasons stated is clear.

It is maintained that the regulation is arbitrary, capricious and unlawful insofar as additional limits were placed

upon the right to the receipt of subsidy, which said limitations are beyond the scope and authority, either expressed or implied, set up by the Directive. The Directive states clearly and simply the conditions imposed upon the payment of subsidy. It does not require interpretation nor implementation, nor is it in any way ambiguous.

The Regulation is invalid for the further reason that the conditions which were imposed upon the right to receive the subsidy have no logical relationship to the purpose and policy of the subsidy as expressed in the controlling Directive. The subsidy was designed to relieve non-processing slaughterers who had no source of income from integrated operations. Petitioner clearly falls within the class intended to receive the benefit of the additional subsidy.

The mere fact of ownership or control of a non-processing slaughterer does not in itself raise any necessary inference, under the terms of the Directive, that the non-processing slaughterer was not intended, nor entitled, to receive the benefit of the payment.

Even more forcibly, it cannot logically be held that the bare fact that in excess of 10% of any class or stock of Petitioner was owned by a processor or purveyor of meat in and of itself furnishes any reason for the denial of the right to payment of subsidy. There is no logical relationship between the additional condition imposed by the Regulation and the policy and purpose of the Directive. The Petitioner has at all times operated as a non-processing slaughterer. It has derived no benefit directly or indirectly from the fact of ownership of its stock by a processor or purveyor of meat, nor has it under the law any control over the fact of the ownership of its stock by a third party.

-It should be emphasized at this point that at no time was the actual existence of ownership or control, nor the existence of benefits, direct or indirect, resulting from the relationship between Petitioner and a processor or purveyor

of meat, examined or adjudicated as a question of fact on the basis of testimony or evidence produced. Petitioner was denied the right to subsidy solely on the ground of the ownership of in excess of 10% of its capital stock by a processor or purveyor of meat.

D.

Petitioner was denied the right to receive payment of additional subsidy on the sole ground that in excess of 10% of its stock was owned by a processor or purveyor of meat. Even if the regulation inferred from the fact of such ownership the existence of control as a prima facie presumption, such presumption would be invalid under the decisions of this court.

In *Tot v. United States*, 319 U. S. 463, this court held at 467:

"Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

In common experience there is no necessary inference of control arising from the bare fact of ownership of in excess of 10% of any class of stock of the corporation.

The presumption or inference created by the regulation is further defective in that it raises an inference upon an inference. A finding is made that a processor of meat owns in excess of 10% of the stock of a non-processing slaughterer. From that fact it is inferred that the processor owns or controls the non-processing slaughterer. Upon the basis of that inference, it is then presumed that benefits result, direct or indirect, either to the non-processing slaughterer or to the processor of meat which are of such a nature as to justify the denial of subsidies to Petitioner on the claim that payment thereof would not subserve the

policy and purpose of the additional subsidy authorized under the Directive of October 25, 1943. Such inferences, of course, are invalid under the rule in the *Tot* case and as such are unlawful, arbitrary and capricious.

E.

The Regulation in question is subject to a graver criticism. The Respondents are not satisfied to rely upon a *prima facie* presumption, which, though placing upon Petitioner the burden of proof, would at least allow it if the facts justified, to show that ownership or control did not, in fact, exist, or that no benefits were derived by reason of the alleged affiliation.

The Regulation conclusively presumed the existence of ownership or control from the mere fact of ownership or control of in excess of 10% of any class of the capital stock of Petitioner. It was not even necessary that the stock have voting rights. No opportunity was given to Petitioner to present evidence or to have a hearing upon the basic issue of the right to subsidy and as a matter of fact, no such opportunity was afforded to it.

The use of a conclusive presumption of fact as an administrative or legislative device has been repeatedly condemned by this Court as a denial of due process, both under the 14th Amendment, *Schlesinger v. Wisconsin*, 270 U. S. 230, and under the 5th Amendment, *Heiner v. Donnan*, 285 U. S. 312. As the Court in the *Heiner v. Donnan* case stated:

"However, whether the latter (the conclusive) presumption be treated as a rule of evidence or of substantive law it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not and cannot be made to, exist in actuality . . . This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment."

The Regulation is therefore obviously improper and unlawful. *U. S. v. Wainwright*, 285 U. S. 118.

Respondents have suggested that the Regulation does not constitute a conclusive presumption of fact, but that it is a substantive rule of law whose promulgation is within the discretion and authority of Respondents as administrative agencies of the Government. It is, of course, obvious that the Regulation is, in fact, a conclusive presumption. If it is a mere substantive rule of law, it would be invalid under the principles heretofore discussed in view of the fact that the line of demarcation drawn by the Regulation, as between those entitled to the subsidy and those denied its benefits, is arbitrary and capricious and without logical or rational basis.

The Respondents have sought to justify the use of the conclusive presumption embodied in the Regulation on the ground of administrative convenience, urging that the determination of the problem of ownership and control is a vexing and difficult problem of fact, and one which would necessarily result in hard cases, difficult of decision. They seek to avoid the necessity of such adjudications on the ground of their alleged difficulty on the score of administrative convenience. The argument in essence is one considered by this court in the case of *Schlesinger v. Wisconsin*, 270 U. S. 230, in which the Court stated:

"The presumption and the consequent tax are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the Federal Constitution are not to be so lightly treated: they are superior to this supposed necessity. The State is forbidden to deny due process of law or equal protection of the laws for any purpose whatsoever."

A similar expression is contained in the decision of this court in the case of *Heiner v. Donnan*, 285 U. S. 312, in which the court stated at 328:

"To sustain the validity of this irrebutable presumption it is argued with apparent conviction that under the *prima facie* presumption originally in force there had been a loss of revenue and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty—a new and startling doctrine condemned by its mere statement and distinctly repudiated by this court in the *Schlesinger and Hooper* case involving similar situations. Both emphatically declare that such rights are superior to the supposed necessity."

Several references have been made in the course of this argument to the decision of the Emergency Court of Appeals in the matter of *Earl C. Gibbs, Inc., v. Defense Supplies Corporation*, and *Reconstruction Finance Corporation*, 155 F. (2d) 525, which is now pending before this Court on a petition for writ of certiorari as No. 147 of the October term 1946. That case involves issues and facts substantially similar to those involved in the present controversy. The Emergency Court of Appeals in its opinion below with respect to which the writ of certiorari is sought, stated that it considered its opinion in the Gibbs case to be controlling. It stated (R.):

"The question of the validity of the definitions contained in Section 14 of Regulation 3, as added by Amendment No. 2, was before this court in *Earl C. Gibbs, Inc., v. Defense Supplies Corporation*, 155 F. 2d 525 (1946) . . . It is sufficient to say that the Gibbs decision squarely rules this case."

It is to be observed that the Emergency Court of Appeals said, in the Gibbs decision, that the disqualifying indebtedness could be refinanced, and that the disqualification

from receipt of subsidies thereby removed. This avenue of escape was not open to Petitioner since it could not, under the law, in any way control the ownership of its stock, nor cause the disqualifying stock interest to be divested.

It should be further noted that Judge McAllister dissented from the majority opinion handed down by the Emergency Court of Appeals in the Gibbs case. His dissent was based squarely upon the issue of the validity of the conclusive presumption set up by the Regulation, the dissent taking the position that all legitimate administrative considerations of convenience would be properly served by a presumption of inference *prima facie* in terms and which allowed to Petitioner the right to present facts to rebut the presumption. A fair hearing, required under the principles of due process, would thus be afforded. As the opinion states:

"But it would be unreasonable to deny complainant any opportunity to prove that it was unaffiliated with a processor, or, while admitting it was not owned or controlled by a processor, to refuse the subsidy payment, merely because of the conclusive presumption promulgated by the administrative agency. Accordingly, I am of the opinion that the conclusive presumption of ownership or control provided by the Amendment to the Regulation—rather than a *prima facie* presumption—is arbitrary and unreasonable, and should be set aside."

It is submitted that this controversy presents a question of major importance. The decision of the Emergency Court of Appeals, if allowed to stand, provides a foundation for a doctrine which if logically extended, might result in grave injury to the right of Petitioner and of litigants generally.

Under the decision administrative agencies generally might well justify a refusal to grant a fair hearing on the facts solely on the ground that it is inconvenient or difficult to determine the facts, or that the issue is closed and

susceptible of varying interpretations. The power of administrative agencies generally to adjudicate facts, and the rules which limit the power of courts generally to review administrative findings of fact, are amply safeguarded so far as any legitimate considerations of administrative convenience are concerned. There is no valid reason for extending the powers of administrative agencies in this respect, in violation of the rules stated in many decisions of this court.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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